



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2015-0028; FRL-9925-47-Region 3]**

**Approval and Promulgation of Air Quality Implementation Plans;  
West Virginia; Permits for Construction and Major Modification of Major Stationary  
Sources for the Prevention of Significant Deterioration**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing conditional approval for two State Implementation Plan (SIP) revisions submitted by the West Virginia Department of Environmental Protection (WVDEP) for the State of West Virginia on July 1, 2014 and June 6, 2012. These revisions pertain to West Virginia's Prevention of Significant Deterioration (PSD) permit program and include provisions for preconstruction permitting requirements for major sources of fine particulate matter (PM<sub>2.5</sub>) found in West Virginia regulations. This action is being taken under the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before **[insert date 30 days from date of publication]**.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R03-OAR-2015-0028 by one of the following methods:

- A. [www.regulations.gov](http://www.regulations.gov). Follow the on-line instructions for submitting comments.
- B. E-mail: [campbell.dave@epa.gov](mailto:campbell.dave@epa.gov).
- C. Mail: EPA-R03-OAR-2015-0028, David Campbell, Associate Director, Office of Permits

and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-R03-OAR-2015-0028. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

**Docket:** All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, i.e., CBI or other

information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittals are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Wentworth, (215) 814-2183, or by e-mail at [Wentworth.paul@epa.gov](mailto:Wentworth.paul@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The WVDEP submitted two SIP revisions to EPA on June 6, 2012 (the 2012 submittal) and on July 1, 2014 (the 2014 submittal). EPA is acting on these two submittals as a whole.<sup>1</sup> A summary of all the changes made in each of the submittals has been included in the docket for this action in a document titled, “Summary of West Virginia PSD Changes.” These SIP revision requests, if approved, would revise West Virginia’s currently approved PSD program by amending Series 14 under Title 45 of West Virginia Code of State Rules (45CSR14).

On May 16, 2008, EPA promulgated a rule to implement the 1997 PM<sub>2.5</sub> National Ambient Air Quality Standard (NAAQS), including changes to the New Source Review (NSR) program (the 2008 NSR PM<sub>2.5</sub> Rule). *See* 73 FR 28321. The 2008 NSR PM<sub>2.5</sub> Rule revised the NSR program

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<sup>1</sup> EPA is proposing to act on both SIP submittals in this notice because each submittal contains necessary procedural information related to West Virginia’s revisions to its PSD regulations and development of its SIP submittals, which are required for SIP revisions by 40 CFR Parts 51 and 52.

requirements to establish the framework for implementing preconstruction permit review for the PM<sub>2.5</sub> NAAQS in both attainment and nonattainment areas.<sup>2</sup> The 2008 NSR PM<sub>2.5</sub> rule: 1) required NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; 2) established significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (including sulfur dioxide (SO<sub>2</sub>) and oxides of nitrogen (NO<sub>x</sub>)); 3) established PM<sub>2.5</sub> emission offsets; and 4) required states to account for gases that condense to form particles (condensables) in PM<sub>2.5</sub> emission limits.<sup>3</sup>

The 2008 NSR PM<sub>2.5</sub> Rule (as well as the more general PM<sub>2.5</sub> NAAQS implementation rule, the 2007 “Final Clean Air Fine Particle Implementation Rule” (2007 PM<sub>2.5</sub> Implementation Rule)<sup>4</sup>), was the subject of litigation before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Natural Resources Defense Council v. EPA* (hereafter, *NRDC v. EPA*).<sup>5</sup> On January 4, 2013, the D.C. Circuit remanded to EPA both the 2007 PM<sub>2.5</sub> Implementation Rule and the 2008 NSR PM<sub>2.5</sub> Rule. The court found that in both rules EPA erred in implementing the 1997 PM<sub>2.5</sub> NAAQS solely pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA (subpart 1), rather than pursuant to the additional implementation provisions specific to particulate matter in subpart 4 of part D of title I (subpart 4).<sup>6</sup> As a result, the D.C. Circuit remanded both rules and instructed EPA “to re-

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<sup>2</sup> The PSD permitting program is the NSR permit program in areas attaining a particular NAAQS.

<sup>3</sup> On October 25, 2012, EPA took final action to amend the definition of “regulated NSR pollutant” promulgated in the 2008 NSR PM<sub>2.5</sub> Rule regarding the particulate matter (PM) condensable provision at 40 CFR 51.166(b)(49)(vi) and 52.21(b)(50)(i). See 77 FR 65107. The rulemaking removed the inadvertent requirement in the 2008 NSR PM<sub>2.5</sub> Rule that the measurement of condensable “particulate matter emissions” be included as part of the measurement and regulation of “particulate matter emissions.”

<sup>4</sup> 72 FR 20586 (April 25, 2007).

<sup>5</sup> 706 F.3d 428 (D.C. Cir. 2013).

<sup>6</sup> The court’s opinion did not specifically address the point that implementation under subpart 4 requirements would still require consideration of subpart 1 requirements, to the extent that subpart 4 did not override subpart 1. EPA assumes that the court presumed that EPA would address this issue of potential overlap between subpart 1 and

promulgate these rules pursuant to subpart 4 consistent with this opinion.” Although the D.C. Circuit declined to establish a deadline for EPA’s response, EPA intends to respond promptly to the court’s remand and to promulgate new generally applicable implementation regulations for the PM<sub>2.5</sub> NAAQS in accordance with the requirements of subpart 4. In the interim, however, states and EPA still need to proceed with implementation of the 1997 PM<sub>2.5</sub> NAAQS in a timely and effective fashion in order to meet statutory obligations under the CAA and to assure the protection of public health intended by those NAAQS. In a June 2, 2014 final rulemaking entitled “Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle (PM<sub>2.5</sub>) National Ambient Air Quality Standard (NAAQS) and 2006 PM<sub>2.5</sub> NAAQS; Final Rule,” (79 FR 31566), EPA identified the classification status under subpart 4 for areas currently designated nonattainment for the 1997 and 2006 PM<sub>2.5</sub> NAAQS.<sup>7</sup>

As the requirements of Subpart 4 only pertain to nonattainment areas, EPA does not consider the portions of the 2008 NSR PM<sub>2.5</sub> Rule that address requirements for PM<sub>2.5</sub> attainment and unclassifiable areas to be affected by the *NRDC v. EPA* opinion. Moreover, EPA does not anticipate the need to revise any PSD permitting requirements promulgated in the 2008 NSR PM<sub>2.5</sub> Rule in order to comply with the D.C. Circuit's decision. This proposed rulemaking addresses West Virginia’s PSD regulations. Thus, EPA has evaluated the regulations with applicable PSD requirements in the CAA, its implementing regulations, and the 2008 NSR PM<sub>2.5</sub> Rule.

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subpart 4 requirements in subsequent actions.

<sup>7</sup> That June 2, 2014 rulemaking (79 FR 31566) also established a December 31, 2014 deadline for the submission of any additional attainment related SIP elements that may be needed to meet the applicable requirements of subpart 4.

The CAA's PSD provisions also establish maximum allowable increases over baseline concentrations — also known as "increments" — for certain pollutants. EPA has the task of promulgating regulations to prevent the significant deterioration of air quality that would result from the emissions of pollutants EPA began regulating after Congress enacted the PSD provisions in the CAA, which includes PM<sub>2.5</sub>. The PSD provisions establish preconstruction review and permitting of new or modified sources of air pollution. In 2007, EPA proposed a rule establishing increments for PM<sub>2.5</sub> and also proposed two screening tools that would exempt permit applicants from some air quality analysis and monitoring required for PSD: significant impact levels (SILs) and significant monitoring concentration (SMC). *See* 72 FR 54112 (September 21, 2007). In our October 20, 2010 final rule (the PM<sub>2.5</sub> PSD Increments-SILs-SMC Rule), EPA set values for both SILs and SMC for PM<sub>2.5</sub>. *See* 75 FR 64864.

The Sierra Club challenged EPA's authority to implement PM<sub>2.5</sub> SILs and SMC for PSD purposes as promulgated in the PM<sub>2.5</sub> PSD Increments-SILs-SMC Rule. *See Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013). On January 22, 2013, the D.C. Circuit granted a request from EPA to vacate and remand to the Agency the portions of the PM<sub>2.5</sub> PSD Increments-SILs-SMC Rule addressing the SILs for PM<sub>2.5</sub> (found in paragraph (k)(2) in 40 CFR 51.166 and 52.21), except for the parts codifying the PM<sub>2.5</sub> SILs at 40 CFR 51.165(b)(2), so that the EPA could voluntarily correct an error in the provisions. *Id.* at 463-66. The D.C. Circuit also vacated parts of the PSD Increments-SILs-SMC Rule establishing the PM<sub>2.5</sub> SMC, finding that the Agency had exceeded its statutory authority with respect to these provisions. *Id.* at 469.

In response to the D.C. Circuit's decision, EPA took final action on December 9, 2013 to remove

the SIL provisions from the Federal PSD regulations in 40 CFR 52.21 and to revise the SMC for PM<sub>2.5</sub> to zero micrograms per cubic meter. *See* 78 FR 73698. Because the D.C. Circuit vacated the SMC provisions in 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c), EPA revised the existing concentration for the PM<sub>2.5</sub> SMC listed in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) to zero micrograms per cubic meter. EPA did not entirely remove PM<sub>2.5</sub> as a listed pollutant in the SMC provisions because to do so might lead to the issuance of permits that contradict the holding of the D.C. Circuit as to the statutory monitoring requirements. *Id.* (providing EPA’s explanation for including the zero micrograms per cubic meter SMC).

On May 9, 2013, EPA had disapproved a narrow portion of a SIP revision submitted by the State of West Virginia on August 31, 2011 for revising West Virginia’s PSD requirements in 45 CSR14 because the submittal did not satisfy the Federal requirement for inclusion of condensable emissions of PM (condensables) within the definition of “regulated new source review (NSR) pollutant” (at 45CSR14 section 2.66) for PM<sub>2.5</sub> and PM emissions less than or equal to ten micrometers in diameter (PM<sub>10</sub>).<sup>8</sup>

## **II. Summary of SIP Revision and EPA Analysis**

### **A. Summary of SIP Revision**

Specifically, the revisions submitted by WVDEP on July 1, 2014 and June 6, 2012 involve amendments to 45CSR14 (Permits for Construction and Major Modification of Major Stationary Sources for the Prevention of Significant Deterioration) based on the Federal regulatory actions discussed above in section I. A summary of the changes made in the 2012 and 2014 submittals are available in the docket in a document titled, “Summary of West Virginia NSR Changes.”

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<sup>8</sup> *See* 78 FR 27062 (May 9, 2013). The limited disapproval of the narrow portion of the August 31, 2011 SIP provision (concerning 45CSR14 section 2.66) is discussed in 78 FR 27062 and in 40 CFR 52.2522(j)(1) specifically.

Generally, the revisions in the 2012 submittal were submitted to incorporate provisions related to the 2008 NSR PM<sub>2.5</sub> Rule. The 2014 submittal revises certain subdivisions of the 2012 submittal as shown in the table below:

Rule 45CSR14 Subdivision	Description of Change
2.66.a.1	Added PM condensable emissions to definition of "regulated NSR pollutant"
2.66.a.2	Added language identifying precursors to NAAQS pollutants to the definition of "regulated NSR pollutant"
16.7.c	Deleted 24-hour de minimis air quality impact concentration value for PM <sub>2.5</sub> (aka SMC for PM <sub>2.5</sub> )
16.1.a & b	Added provision exempting requirements of 9.1 for stationary sources based on completeness date of permit applications
9.2	Significant Impact Levels. Deleted this provision in its entirety

In general, the 2014 submittal adds PM condensable emissions to the definition of "regulated NSR pollutant" and deletes SILs and SMC for PM<sub>2.5</sub> in the 45CSR14 provisions submitted for SIP approval.

## **B. EPA Analysis**

EPA finds the revisions to 45CSR14 contained in the 2012 submittal and the 2014 submittal which were submitted by WVDEP for approval mirror the PSD requirements of the 2008 NSR PM<sub>2.5</sub> Rule with certain exceptions described in the next paragraph. The 2014 submittal addresses and corrects the deficiency identified in EPA's May 9, 2013 disapproval (78 FR 27062) by adding language to the provision at 45CSR14 section 2.66.a.1 which now includes

PM condensable emissions in the definition of "regulated NSR pollutant." Thus, EPA finds West Virginia has addressed the deficiency noted in our limited disapproval in 78 FR 27062.

However, while the 2014 submittal appropriately removes SILs for PM<sub>2.5</sub> consistent with the D.C. Circuit's *Sierra Club v. EPA* decision and our final December 9, 2013 rulemaking (78 FR 73698), West Virginia's PSD provision at 45CSR14-16.7.c (included in the 2014 submittal) does not include a SMC value of zero micrograms per cubic meter for PM<sub>2.5</sub> consistent with the D.C. Circuit's *Sierra Club v. EPA* decision and our December 9, 2013 rulemaking (78 FR 73698) which addressed the D.C. Circuit's vacature of the SMC provisions in 40 CFR Parts 51 and 52 for PM<sub>2.5</sub>. Therefore, West Virginia's PSD regulation, 45CSR14, does not fully meet the requirements for PSD programs as set forth in the 2008 NSR PM<sub>2.5</sub> Rule, the D.C. Circuit's decision on SILs and SMC in *Sierra Club v. EPA*, and in EPA's December 9, 2013 rulemaking addressing that decision for SILs and SMC.

However, on January 20, 2015, West Virginia committed to submitting an additional SIP revision with a revised PSD regulation at 45CSR14-16.7.c which will incorporate a SMC value of zero micrograms per cubic meter for PM<sub>2.5</sub> to address this discrepancy. West Virginia committed to submitting this SIP revision no later than one year following the effective date of the final rulemaking notice for conditional approval of the 2012 and the 2014 submittals so that EPA can conditionally approve the 2012 and 2014 submittals.<sup>9</sup> See CAA section 110(k)(4).

With the exception of the absence of the SMC value of zero micrograms per cubic meter for PM<sub>2.5</sub> which WVDEP has committed to address, EPA finds the 2012 and 2014 submittals meet

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<sup>9</sup> West Virginia's letter from the Secretary of WVDEP committing to submit a revised provision in 45CSR14 to address the SMC for PM<sub>2.5</sub> is available in the docket for this rulemaking (EPA-R03-OAR-2015-0028) and available online at [www.regulations.gov](http://www.regulations.gov).

applicable requirements for a PSD permitting program in the CAA, its implementing regulations, and the 2008 NSR PM<sub>2.5</sub> Rule. The EPA is soliciting public comments on the issues discussed in this document. Any comments submitted in a timely manner will be considered before taking final action.

### **III. Proposed Action**

EPA is proposing conditional approval of these West Virginia SIP revisions, the 2012 and 2014 submittals, because West Virginia is committing to submit an additional SIP revision addressing the deficiency identified by EPA regarding the deletion of the PM<sub>2.5</sub> SMC within one year of the date of EPA's final conditional approval and because the submittals otherwise meet CAA requirements as discussed in this proposed rulemaking. Once EPA has determined that West Virginia has satisfied this condition, the conditional approval of the 2012 and 2014 submittals will become a full approval. Should West Virginia fail to meet the condition specified above, the conditional approval of the 2012 and 2014 submittals will convert to a disapproval pursuant to CAA section 110(k)(4).

The full or partial disapproval of a SIP revision triggers the requirement under CAA section 110(c) that EPA promulgate a federal implementation plan (FIP) no later than two years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. EPA has determined that West Virginia's 2014 submittal has rectified the deficiency regarding including condensables in the definition of regulated NSR pollutant noted in our limited disapproval in 78 FR 27062. Therefore, upon final approval of the 2014 submittal, the EPA is no longer required to promulgate a FIP to address the issue of PM condensables in the definition of regulated NSR

pollutant for West Virginia's PSD permit program, and our narrow disapproval of the August 31, 2011 PSD SIP (for failure to include condensables in definition of regulated NSR pollutant) will become a full approval. However, EPA is proposing conditional approval for the 2012 and 2014 submittals due to West Virginia's lack of a PM<sub>2.5</sub> SMC with the value of zero micrograms per cubic meter.

#### **IV. Incorporation by Reference**

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the WV regulations at 45CSR14 regarding the Prevention of Significant deterioration permitting requirements as discussed in section III of this preamble. The EPA has made, and will continue to make, these documents generally available electronically through [www.regulations.com](http://www.regulations.com) and/or in hard copy at the appropriate EPA office (see the ADDRESSES section of this preamble for more information).

#### **V. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, relating to West Virginia's PSD program, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 et seq.

Dated: March 12, 2015.

William C. Early, Acting  
Regional Administrator,  
Region III.

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